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6 UNITED STATES DISTRICT COURT FOR THE  
7 EASTERN DISTRICT OF WASHINGTON

8 ZIRKLE FRUIT COMPANY, a  
Washington Corporation,

9 Plaintiff,

10 v.

11 UNITED STATES DEPARTMENT  
OF LABOR;

12 PATRICK PIZZELLA, in his official  
capacity as Acting United States  
13 Secretary of Labor;

14 JOHN P. PALLASCH, in his official  
capacity as Assistant Secretary of  
15 Labor, Employment & Training  
Administration, United States  
16 Department of Labor;

17 CHERYL M. STANTON, in her  
official capacity as Administrator of  
18 the Wage & Hour Division, United  
States Department of Labor;

19 Defendants.  
20

Case No.:

**COMPLAINT AND PRAYER FOR  
DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF**

COMPLAINT AND PRAYER FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF - 1

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## I. INTRODUCTION

1. Plaintiff brings this action seeking emergency relief from the Department of Labor’s imposition of arbitrary and unsubstantiated cost increases on Washington blueberry growers caused by recently set Prevailing Wage Rates.

2. On or about July 24, 2019, the Department of Labor sent Plaintiff a “Notice of Wage Adjustment” indicating that as of July 23, 2019, the Prevailing Wage Rate (“PWR”) for blueberry harvesting had increased 50%, from \$0.50 to \$0.75 per pound. *See* U.S. Department of Labor, Employment and Training Administration Office of Foreign Labor Certification, *Notice of Wage Adjustment*, dated July 24, 2019 (“Notice”; attached hereto as Exhibit 1).

3. The “PWR” does not reflect the actual prevailing wage for blueberry harvesters in Washington State. Rather, it reflects an inadequate and procedurally deficient sampling of what appears to be an extreme minority of blueberry producers without any of the required considerations for variety, crop density, geographic or other factors. Enforcing an unprecedented wage jump rate like this would cause Plaintiff to suffer a sudden, unsustainable, and financial calamitous increase in labor costs in the middle of harvest. Plaintiff therefore respectfully urges the Court to provide the requested emergency relief so as to avoid the immediate and irreparable harm that this ruinous new rate will cause.

## II. JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); 5 U.S.C. § 702 (providing for judicial review of agency action under the federal Administrative Procedure Act (“APA”)).

## III. PARTIES<sup>1</sup>

5. Plaintiff Zirkle Fruit Company (“Zirkle”) is incorporated under the laws of the State of Washington and has its principle offices in Selah, Washington. Zirkle farms approximately 849 acres of blueberries throughout eastern Washington. In 2018, Zirkle produced 12,808,000 pounds of blueberries. In 2019, Zirkle is expected to produce 14,560,000 pounds of blueberries. In each year Zirkle utilized a work force of more than 1,900 domestic and H-2A workers to harvest its blueberries.

6. The United States Department of Labor (“DOL”) is a department within the executive branch of the federal government. The Department administers, interprets, and enforces numerous federal laws, including the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986.

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<sup>1</sup> Given the urgency, Zirkle filed this Complaint as soon as possible and by itself. However, Zirkle expects that additional growers may wish to join this action in the near future.

1           7. Defendant Patrick Pizzella is the Acting United States Secretary of Labor.  
2 He is responsible for all functions of the Department of Labor, including the Office of  
3 Foreign Labor Certification within the Employment and Training Administration, which  
4 issues H-2A labor certifications, as well as the Wage and Hour Division, enforces H-2A  
5 pay rates. Acting Secretary Pizzella is sued in his official capacity; he is an official  
6 resident of Washington, D.C.

7           8. Defendant John P. Pallasch is the Assistant Secretary of Labor for the  
8 Employment and Training Administration (“ETA”). The ETA generated and sent the  
9 Notice of Wage Adjustment. The ETA is responsible for reviewing preliminary wage  
10 findings and making official Prevailing Wage determinations. Assistant Secretary  
11 Pallasch is sued in his official capacity; he is an official resident of Washington, D.C.

12           9. Defendant Cheryl M. Stanton is the Administrator of the Department of  
13 Labor’s Wage & Hour Division (“WHD”). The WHD is responsible, *inter alia*, for  
14 enforcing the terms and conditions of H-2A labor certifications issued by the ETA.  
15 Zirkle seeks to enjoin the WHD from enforcing the terms of the Notice of Wage  
16 Adjustment issued by ETA on July 24, 2019. Administrator Stanton is sued in her  
17 official capacity; she is an official resident of Washington, D.C.

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#### IV. RELEVANT BACKGROUND

##### A. The H-2A Program & Prevailing Wage Rates

10. Pursuant to the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), the H-2A program establishes a means for agricultural employers to bring into the United States nonimmigrant seasonal workers if there is a demonstrated shortage of domestic workers.

11. The Immigration and Nationality Act charges the Department of Labor with ensuring that the entry of H-2A not adversely affect the wages and working conditions of United States workers. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 393 (D.C. Cir. 2018).

12. The DOL requires that employers pay the highest of the Adverse Effect Wage Rate (“AEWR”),<sup>2</sup> any collectively bargained wage rate, the state or federal minimum wage, or the state prevailing wage for that particular crop or occupation. *See* 20 C.F.R. § 655.120.

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<sup>2</sup> According to 29 C.F.R. § 502.10(a),

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator of the Office of Foreign Labor Certification (OFLC) has determined must be offered and paid to every H-2A worker employed under the DOL-approved Application for Temporary Employment Certification in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H-2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

13. The DOL defines the Prevailing Wage Rate as “the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.” *See* U.S. Department of Labor, Employment & Training Administration, *Prevailing Wages (PERM, H-2B, H-1B, H-1B1 and E-3)*, available at <https://www.foreignlaborcert.doleta.gov/pwscreens.cfm>.<sup>3</sup>

14. In practice, the DOL requires that each State’s employment security agency — for the State of Washington, the ESD — conduct surveys of its agricultural employers and employees in accordance with ETA Handbook No. 385 (“Handbook 385”, attached hereto as **Exhibit 2**) and then determine the Prevailing Wage Rates. Those wage rate determinations are then subject to review and revision by the ETA. *See* Handbook 385 at I-118.

15. If and when an employer receives notice from the DOL that the Prevailing Wage Rate has increased such that it is now higher than the AEWR, the agreed-upon collective bargaining wage, and the Federal or State minimum wage the employer must

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<sup>3</sup> By regulation, the Prevailing Wage Rate is defined as the “[w]age established pursuant to 20 CFR 653.501(d)(4).” 20 C.F.R. § 655.103. However, what was once section 653.501(d)(4) has since been relocated to 653.501(c)(2)(i). *See Garcia v. Acosta*, CV 18-1968 (RDM), 2019 WL 2581324, at \*2 (D.D.C. June 24, 2019) (noting the relocation).

1 pay all its H-2A workers that higher wage — even if in the middle of a work contract.  
2 *See* 20 CFR § 655.120(b).

3 16. The H-2A regulations do not provide any means of challenging a  
4 Prevailing-Wage-Rate determination. *See* U.S. Department of Labor, Employment &  
5 Training Administration, *OFLC Frequently Asked Questions and Answers, H-2A*  
6 *Temporary Labor Certification Program (Agricultural), Appeals*, available at  
7 <https://www.foreignlaborcert.doleta.gov/pwscreens.cfm>.

8 17. Thus, an employer facing a suspected inaccurate or otherwise invalid  
9 Prevailing Wage Rate has no means by which to obtain timely relief absent court  
10 intervention.

#### 11 **B. Zirkle Fruit & the Notice of Wage Adjustment**

12 18. Zirkle is a family-owned farming operation based out of Selah,  
13 Washington. It grows apples, cherries, pears, wine grapes and blueberries.

14 19. Washington State is among the nation's largest blueberry producers. In  
15 2019 the state is projected to harvest more than 20,000 acres which will produce  
16 approximately 140,000,000 pounds of blueberries. About 70% of those blueberries will  
17 be harvested by machine. The balance, or about 42,000,000 pounds, will be harvested  
18 by hand laborers.

19 20. There are approximately 250 independent blueberry growers in the State.  
20 There is a wide variance in the size and sophistication of the various operations. The

1 Washington State Blueberry Commission estimates that only about 20 of those  
2 producers grow 75% of the blueberries. In terms of volume, that means approximately  
3 20 producers will harvest about 105,000,000 pounds of blueberries, while the remaining  
4 230 growers will produce 25% or 35,000,000 pounds.

5 21. There are many different factors that impact the time and difficulty that it  
6 takes to hand-harvest a pound of blueberries. Some varieties such as Duke or Draper  
7 are easier generally easier to pick quickly and in high volumes. Others, such as Aurora  
8 or Last Call, typically take more time and are difficult to pick quickly.

9 22. There are also significant horticultural factors that impact how easily a  
10 worker may be able to pick a pound of blueberries. For example, a conventional  
11 blueberry farm composed of Aurora blueberries and located in Whatcom County may  
12 have a fairly sparse fruit load, such that a worker earning \$0.50 per pound may struggle  
13 to earn minimum wage. In an organic field composed of Draper blueberries and located  
14 in Grant County, on the other hand, a hand-picker earning \$0.50 per hour may easily be  
15 able to earn \$16.00 per hour or more. Soil, sun, pest pressure, pruning practices, and a  
16 range of other factors will have significant impacts on a hand-picker's ability to harvest  
17 a pound of fruit in any particular time frame.

18 23. Most employers will pick a given blueberry field several times over the  
19 course of the harvest season, with each successive picking generally yielding less fruit.  
20



1 The less fruit that is generated will result in a correspondingly higher piece rate wage, as  
2 workers

3 24. Zirkle had its first harvest of blueberries in 2006. In 2019 it projects to  
4 harvest about 14,560,000 pounds of blueberries from 849 acres. Zirkle is an outlier in  
5 the blueberry industry in that it is an extremely large operator but it harvests 100% of its  
6 blueberries by hand. The 14,560,000 pounds to be harvested by Zirkle in 2019  
7 represents more than 10% of the entire State's production (which itself is extraordinary  
8 for 1 of 250 growers), and it does this with less than 5% of the reported acreage in  
9 production. Zirkle alone will produce more than 1/3 of the State's hand-picked crop.

10 25. Washington's agricultural employers have faced significant labor  
11 shortages for more than the past decade. In response to such shortages an increasing  
12 number of agricultural employers have turned to the federal H-2A system to bring in  
13 temporary foreign laborers to assist with the extreme seasonal demands for labor. In  
14 2010, for example, Washington employers brought in 3,014 H-2A workers. By 2015  
15 the number of H-2A workers exceeded 11,000. By 2018 the number of H-2A workers  
16 in Washington exceeded 20,000.

17 26. Zirkle was one of Washington's first significant adaptors of the H-2A  
18 program. It first began using H-2A workers on its apple orchards in 2005. It has used  
19 H-2A workers to help hand-pick blueberries since 2008.

1           27. Hand-harvesting blueberries is labor intensive and occurs in a narrow  
2 window between late June and the end of September. Due to its practice of harvesting  
3 all of its crop by hand, Zirkle must heavily rely on H-2A labor to complete harvest.

4           28. In January of 2019, Zirkle petitioned the DOL for authority to bring in 900  
5 H-2A workers to Washington State to perform a range of agricultural activities in  
6 Zirkle's cherry, apple, pear and blueberry operations. In March of 2019 Zirkle  
7 submitted a second petition to DOL seeking authority to bring in an additional 1,850 H-  
8 2A workers. As part of both petitions, Zirkle expressly offered to pay the H-2A  
9 workers \$0.50 per pound to pick blueberries, with a guarantee that the blueberry pickers  
10 would earn a minimum of \$15.03 per hour.

11           29. Zirkle's petitions to employ the 2,750 H-2A workers, including its specific  
12 promise to pay workers to pick blueberries \$0.50 per pound, were both approved by the  
13 DOL. The ETA Forms 790, which are also called Clearance Orders, then became  
14 enforceable contracts between the grower and the workers. *See Arriaga v. Florida*  
15 *Pacific Farms, LLC*, 305 F.3d 1228, 1246 fn 27 (11<sup>th</sup> Cir. 2002).

16           30. Zirkle began blueberry harvest in June of 2019. In keeping with its own  
17 practices and consistent with both the Clearance Orders and with federal law, Zirkle  
18 paid \$0.50 per pound to both H-2A workers and to domestic workers. Through July 22,  
19 2019, Zirkle's work force had picked approximately 9,560,000 pounds of blueberries.  
20 The workers have been paid \$4,659,343 for the work performed, earning an effective

1 average hourly rate of \$17.13. In 2018, the effective average hourly rate was \$16.18  
2 per hour.

3 31. In addition to wages, Zirkle provides free housing to its H-2A workers. *See*  
4 8 U.S.C. § 1188(c)(4); 20 C.F.R. § 655.122(d)(1). Zirkle also provides its H-2A  
5 workers with free transportation to and from their place of recruitment (*e.g.*, the U.S.  
6 consulate in their home country) to the worksite, as well as local transportation between  
7 the employer-provided housing and the worksite. *See* 20 C.F.R. § 655.122(h).

8 32. On or about July 24, 2019, the Department of Labor, via the ETA, sent  
9 Zirkle a Notice of Wage Adjustment indicating that as of July 23, 2019, the Prevailing  
10 Wage Rate for blueberry harvesting had increased 50% from \$0.50 to \$.075 per pound.  
11 *See* Notice.

12 33. As of today's date, Zirkle Fruit estimates that it has approximately  
13 5,000,000 pounds of blueberries left to pick. If forced to suddenly pay \$0.75 per pound,  
14 Zirkle's wage expense will increase from \$2,500,000 to \$3,750,000 just in terms of  
15 straight wages. Once paid rest breaks and payroll taxes are factored in, Zirkle's total  
16 additional wage expense will increase by approximately \$1,400,000 between now and  
17 the end of the 2019 blueberry harvest. This increase will wipe out virtually any and all  
18 anticipated profit<sup>4</sup> In addition to depriving Zirkle of necessary cash flow and operating

19 <sup>4</sup> Zirkle's blueberry operations in 2018 resulted in a net profit of \$0.29 per pound. The  
20 \$0.25 mid-season wage increase, coupled with other attendant expenses such as payroll

1 margins, this unilateral, mid-season 50% wage hike will likely result in Zirkle declining  
2 to harvest significant amounts of blueberries, which will put hundreds of farmworkers  
3 out of work, and will likely eliminate hand-picking from its 2020 operations.

4  
5 **V. CLAIM/CAUSE OF ACTION NO. 1:**  
6 **Declaratory Judgment Setting Aside the PWR Determination**

7 Plaintiff realleges the preceding paragraphs as though fully set forth.

8 34. A court may set aside any agency action found to have been undertaken  
9 without observation of the procedure required by law. 5 U.S.C. § 706(2)(D). A court  
10 may also hold unlawful and set aside any agency action that is “arbitrary, capricious, an  
11 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).  
12 “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court  
13 is not to substitute its judgment for that of the agency.” *Motor Vehicles Mfrs. Ass’n v.*  
14 *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency must nevertheless  
15 “examine the relevant data and articulate a satisfactory explanation for its action.” *Id.* A  
16 court may set aside an agency action if it is unwarranted by the facts. 5 U.S.C.  
17 § 706(2)(F).

18 //

19 /

20 taxes and paid rest breaks, will increase Zirkle’s wage expense by \$0.28 per pound,  
virtually eliminating any profit.

1           **1. Defendants Failed to Observe Handbook 385's Requirements.**

2           35. To calculate Prevailing Wage Rates, the DOL requires that each State's  
3 employment security agency generate and provide the DOL with an In-Season Farm  
4 Labor Report (Form ETA-223) as well as a Domestic Agricultural In-Season Wage  
5 Report (Form ETA-232). The requirements of these reports are laid out in Handbook  
6 385.

7           36. Handbook 385 has the force of a regulation and would take a full notice-  
8 and-comment procedure to amend its requirements. *Cf.* Proposed Rules, Department of  
9 Labor, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United*  
10 *States*, 84 FR 36168-01 (proposing an update to the procedural requirements that are  
11 currently set forth in Handbook 385 and noting that the Handbook, "which pre-dates the  
12 creation of the H-2A program and has not been updated since 1981, currently sets the  
13 methodology used to establish prevailing wage rates for all agricultural job orders"). *See*  
14 *also* Washington State Employment Security Department, Labor Market and Economic  
15 Analysis, *2018 Agricultural Peak Employment Wage and Practices Survey Results*,  
16 ("2018 Survey Results") at 14 ("As required by USDOL, LMEA identified the  
17 prevailing wage rates based on responses to the 2018 employer survey according to  
18 federal guidelines contained in ETA Handbook 385.").

19           37. Upon information and belief, Defendants failed to follow several of the  
20 requirements set forth in Handbook 385.

a. **Failure to Distinguish Differing Crop Activity**

38. Handbook 385 makes clear that the Prevailing Wage Rate must take into account the various forms and distinctions of different crop activity:

Crop Activity. This refers to the job actually being performed in a specific crop at time of survey. A single job title, such as "harvest", may apply to the entire crop activity. On the other hand, different stages of the harvest, such as "cotton, 1st pick, 2nd pick, and strip", may be involved; or, a different use of the commodity such as "tomatoes, fresh" or "tomatoes, canning." *In such cases, the important consideration is whether the work is different enough to cause the wage structure to be different.*

*Some crop activities involve a number of separate and distinct operations. Thus, in harvesting tomatoes, some workers pick the tomatoes and place them in containers while others load the containers into trucks or other conveyances. Separate wage rates are usually paid for individual operations or combinations of operations. For the purposes of this report, each operation or job related to a specific crop activity for which a separate wage rate is paid should be identified and listed separately."*

Handbook 385 at I-113 (underline in original; italics added).

39. In discussing the surveying of wages for domestic seasonal workers, Handbook 385 states as follows:

If the wage rates paid in a crop activity vary substantially according to differing production methods, show the rates for each method. Thus, if the cotton harvest includes both cotton picking and cotton pulling, indicate the wage rates for each production method separately.

Similarly, if the wage rates paid for an activity vary substantially for different stages of the activity (for the first versus the second cotton picking, for instance), or for different varieties of the crop, such as different types of apples or beans, show the rates for each stage or variety separately.

Handbook 385 at I-107.

1           40. Here, the Prevailing Wage Rate calculated by the ESD and adopted by the  
 2 DOL includes only one rate of \$0.75 per pound for all blueberry harvesting across all of  
 3 Washington State. There is no variation for organic versus conventional, for first pick  
 4 versus later picks, for variety, for crop load (which is equivalent to the “density”  
 5 differentiations in the apple AEWRs), or for any of the other determinative factors in a  
 6 hand-picker’s ability to produce a pound of blueberries.

7           41. Upon information and belief, the ESD’s In-Season Farm Labor Report and  
 8 Domestic Agricultural In-Season Wage Report did not take into account the critical  
 9 variations in crop activity as required by Handbook 385.

10          42. Upon further information and belief, had the ESD taken proper account of  
 11 the variations in crop activity, the Prevailing Wage Rate for blueberries would have  
 12 either been split into multiple categories, and in the vast majority of instances would  
 13 have been significantly lower than \$.75 per pound.

14                   **b. Failure to Conduct Personal Interviews**

15          43. Handbook 385 mandates that in compiling its reports and determining the  
 16 Prevailing Wage Rates, a State’s employment security agency must rely primarily upon  
 17 in-person interviews to be administered during the survey process. *See* 84 FR 36168-01  
 18 (“The Handbook sets standards, including a requirement for in-person interviews . . .”).

19          44. As the DOL has recently acknowledged, the current requirements for  
 20 employment security agencies — such as the ESD — is that “[a]ll wage surveys *must*

1 include a substantial number of personal employer interviews,” Handbook 385 at I-116  
2 (emphasis added); these interviews “can only be supplemented by telephone or mail  
3 contacts ‘to a limited extent.’” 84 FR 36168-01 (quoting Handbook 385 at I-116). And  
4 even then, “the State agency must assure itself that information gathered in this manner  
5 is representative of the rates being paid in the crop activity.” Handbook 385 at I-116.

6 45. Further, Handbook 385 requires that “[d]ata supplied by employers *must* be  
7 verified through worker interviews,” “[a]n average of 10 percent of the workers  
8 included in the sample for each wage survey *must* be interviewed,” and it states that the  
9 worker sample “should be drawn from workers of as many as possible of the employers  
10 interviewed.” Handbook 385 at I-116 (emphasis added). *See also id.* at I-142 (“Enter in  
11 Column VI the number of workers personally interviewed”); *id.* (“Enter in Column VII  
12 the average hourly earnings reported by the workers personally interviewed.”).

13 46. Here, the ESD has stated outright that it did not rely on personal interviews  
14 with blueberry employers and employees in arriving at its Prevailing Wage Rate. *See*  
15 2018 Survey Results at 10 (Exhibit 3) (“The 2018 worker survey was created to be  
16 administered via phone and as a field survey (paper).”).

17 47. Upon information and belief, had the ESD conducted the required in-  
18 person interviews, the resulting Prevailing Wage Rate for blueberry harvesting would  
19 have been substantially lower than \$0.75 per pound.



1                   **c.     Improper Conversion of Pay Units**

2           48.   For the Domestic Agricultural In-Season Wage Finding Process,  
3 Handbook 385 provides that Prevailing Wage Rates are produced based on the  
4 “40 percent rule” and the “51 percent rule.” Handbook 385 at I-116–17. Under the  
5 40 percent rule, a single rate or schedule that “accounts for the wages paid to 40 percent  
6 or more of the domestic seasonal workers in a single crop activity is the prevailing rate.”  
7 Handbook 385 at I-116. The 51 percent rule states,

8           If no single rate or schedule accounts for 40 percent or more of the workers  
9 *and the rates are all in the same unit of payment* (e.g., per hour, per lb.),  
10 array the rates in descending order and then count the cumulative number  
11 of workers, starting with the lowest in the array, until 51 percent of the  
workers covered in the survey are included. The rate reached at this point  
is the prevailing wage rate. (Rates such as per bushel and per 1 1/4 bushel  
box represent different units of payments).

12 Handbook 385 at I-117 (emphasis added).

13           49.   Handbook 385 then goes on to clarify,

14           If no single rate is being paid to at least 40 percent of the workers in a  
15 single crop activity and there is more than one unit of payment, such as 1  
16 bushel and 1 1/8 bushels, determine the unit which is applicable to the  
17 largest number of workers. Using this unit of payment, determine the  
prevailing rate in accordance with [the 40 percent rule] or [the 51 percent  
rule] above. If there are different units of payment, each one accounting  
for an equal number of workers, make a separate prevailing rate finding for  
each unit.

18 Handbook 385 at I-117 (underline in original).

19           50.   For the Domestic Agricultural In-Season Wage Report, Handbook 385  
20 similarly emphasizes the need to pay close attention to the different types of pay units.

1 “Piece rates should not be converted into hourly rates; likewise, hourly rates should not  
2 be converted into piece rates.” Handbook 385 at I-141. “Base rates with bonuses should  
3 also be shown separately from rates without bonuses.” *Id.* “Rates with earnings  
4 guarantee represent a different method of payment from piece rates without earnings  
5 guarantees, and should be listed separately.” *Id.*

6 51. Here, however, the ESD made several conversions between pay units when  
7 calculating Washington’s Prevailing Wage Rates. *See, e.g.*, 2018 Survey Results at 5  
8 (“When bin dimensions were reported by weight LMEA identified the most common  
9 bin weight from the 2018 Agricultural Peak Employment Wage and Practice Employer  
10 Survey and equated it to the standard linear bin dimension given the commodity in  
11 question.”); *id.* at 6 (“The result of normalizing base wages and wage unit dimensions  
12 drastically increased the number of employers represented in the prevailing wage  
13 finding process on average by 43 percent.”).

14 52. Some blueberry employers do not pay by the pound, but instead based on  
15 the bucket, or lug, or bag, or whatever picking unit is provided to workers on site.

16 53. There is nothing in the 2018 Survey Results to indicate that the ESD  
17 properly articulated and considered the different wage units used by different blueberry  
18 employers.

19 54. Upon information and belief, the ESD’s In-Season Farm Labor Report and  
20 Domestic Agricultural In-Season Wage Report failed to distinguish different wage units

1 and improperly converted wage units to achieve an inflated representation number for  
2 purposes of calculating the Prevailing Wage Rates.

3 55. Upon information and belief, had the ESD properly noted and  
4 distinguished the various difference in wage units, there would have been either no  
5 determination regarding the Prevailing Wage Rate for blueberry harvesting, or it would  
6 have been significantly lower than \$.75 per pound.

7 **d. Failure to Update the Wage Reporting Areas**

8 56. The agricultural reporting area is used as the basic unit in making wage  
9 surveys, and is generally a geographic division within a State or Territory which is  
10 reasonably integrated in terms of farm labor characteristics and which has a significant  
11 supply of, or demand for, seasonal hired farm workers.” Handbook 385 at I-102. These  
12 designations are subject to approval by the ETA national office. *Id.* at I-105.

13 57. State agencies “must review continuously the labor patterns of all parts of  
14 the State to ensure the appropriateness of existing agricultural reporting areas, and to  
15 include all sections of the State meeting the criteria for delineation.” *Id.* at I-105. And  
16 in some instances, the agricultural reporting area should not be the same as a wage  
17 reporting area; “it may be found that subareas are justifiable because of substantial  
18 dissimilarities in crop or related conditions within the agricultural reporting area. Upon  
19 approval by the regional office, an area which is not congruent with a standard  
20

1 agricultural reporting area may be designated as a wage reporting area.” Handbook 385  
2 at I-113.

3 58. There are significant differences in the agricultural labor characteristics and  
4 associated wages between eastern and western Washington. Precipitation, pest and  
5 disease pressures, sun and degree units, growing season, all impact the crop density and  
6 have a direct impact on the actual and prevailing wages paid to workers. That fact that  
7 Zirkle will produce more than 10% of the State’s crop with less than 5% of the State’s  
8 acreage indicates quite clearly that Zirkle’s employees are working with fundamentally  
9 different (heavier more lucrative) crop densities than other workers.

10 59. Upon information and belief, had the ESD and/or the DOL taken proper  
11 account of the differences in the labor characteristics and wages throughout the State,  
12 they would have designated wage reporting areas such that the Prevailing Wage Rate  
13 applicable to Zirkle would have been significantly lower than \$.75 per pound for eastern  
14 Washington.

15 **e. Failure to Explain the Sudden Increase**

16 60. In preparing its Domestic Agricultural In-Season Wage Report, the ESD  
17 was required to explain differences from prior years. *See* Handbook 385 at I-143  
18 (directing the maker of the report to use the comment section “for any pertinent  
19 explanation of developments during the survey or reporting period which require  
20

1 clarification. e.g.: . . . Increase or decrease in prevailing rate from comparable period of  
2 previous year.”).

3 61. Here, the Prevailing Wage Rate for harvesting blueberries increased 50%.  
4 This sudden leap in wages was a red flag that required further investigation and  
5 explanation before adoption and implementation.

6 62. What makes the increase more remarkable is that ESD flagged two other  
7 increases (Bartlett Pears increasing from \$22.00 to \$25.00 per bin, and Skeena Cherries  
8 increasing from \$0.17 to \$0.20 per pound) but remained absolutely silent as to the 50%  
9 increase in blueberries. See 2018 Agricultural Peak Employment Wage and Practice  
10 Employer Survey, “Key Findings”, pg. 1.

11 63. Upon information and belief, had the ESD gone through the process of  
12 trying to explain the sudden 50% increase in blueberry wages, it would have discovered  
13 an error and ultimately amended its findings regarding the blueberry Prevailing Wage  
14 Rate.

15 **2. The PWR is Unwarranted by the Facts and Defendants Acted**  
16 **Arbitrarily in Adopting it.**

17 64. “The finding is the formal announcement of the prevailing wage rate made  
18 after adequate wage data have been collected and the prevailing rate has been  
19 determined.” Handbook 385 at I-113.

1           65. Here, upon information and belief, as described above, there was  
2 inadequate and/or faulty wage data collected regarding blueberry harvesting wages; the  
3 Prevailing Wage Rate was unwarranted by the facts.

4           66. Indeed, the DOL has stated that in its experience, “prevailing wage  
5 increases occur rarely.” 75 FR 6884-01.

6           67. Zirkle is unaware of any instance *in the history of the H-2A program* where  
7 the prevailing wage for the harvest of a single commodity has increased by 50%.

8           68. Here, the ESD reports that it obtained data from 54 growers. *See* 2018  
9 Agricultural Peak Employment Wage and Practice Employer Survey, Supplemental  
10 Attachments, Figure 1 (Exhibit 4). The ESD makes no mention of what percentage of  
11 the 140,000,000 pounds of blueberries those 54 growers represent, or what percentage  
12 of the 42,000,000 pounds of hand-picked blueberries those 54 growers represent. Those  
13 54 growers represent less than 22% of the total independent growers in the State; and if  
14 those growers are not among the 20 largest then they likely produce only a small  
15 fraction of the blueberries grown. All of these factors suggest the ESD used a  
16 statistically insignificant sample size using inappropriate methodology to and  
17 inappropriate conversions to fashion a wage that cannot by any measure be considered  
18 “prevailing”.

19           69. At a minimum, a reported sudden 50% leap in blueberry harvesting wages  
20 should have alerted both the ESD and the DOL that there was likely a problem with the

1 calculated blueberry Prevailing Wage Rate, and that the purported 50% increase was  
2 based in inadequate or unreliable data.

3 70. The ESD and DOL acted arbitrarily in accepting the obviously problematic  
4 50% increase in the blueberry harvesting Prevailing Wage Rate without ensuring that  
5 they had collected adequate and accurate wage data.

6 71. Upon information and belief, had the ESD collected accurate and adequate  
7 wage data, the Prevailing Wage Rate applicable to Zirkle would have been substantially  
8 lower than \$.75 per pound.

9  
10 **VI. CLAIM/CAUSE OF ACTION NO. 2:**  
**Enjoinment from Enforcing the New PWR**

11 Plaintiff realleges the preceding paragraphs as though fully set forth.

12 72. As described above, the DOL plans to impose arbitrary, unsubstantiated,  
13 and ruinously high wage increases on H-2A blueberry farmers.

14 73. In such circumstances, the APA itself anticipates that an agency will  
15 suspend one of its actions. *See* 5 U.S.C. § 705 (“When an agency finds that justice so  
16 requires, it may postpone the effective date of action taken by it, pending judicial  
17 review.”).

18 74. Where there is insufficient time or the agency is unwilling to do so itself,  
19 however, the APA specifically allows for courts to preserve the status quo.

20 On such conditions as may be required and to the extent necessary to  
prevent irreparable injury, the reviewing court, including the court to which

1 a case may be taken on appeal from or on application for certiorari or other  
2 writ to a reviewing court, may issue all necessary and appropriate process  
3 to postpone the effective date of an agency action or to preserve status or  
4 rights pending conclusion of the review proceedings.

5 5 U.S.C. § 705.

6 75. These provisions complement Federal Rule of Civil Procedure 65, which  
7 provides for the use of preliminary injunctions.

8 76. In considering whether to grant a preliminary injunction, the court  
9 considers (A) the likelihood of success on the merits; (B) whether irreparable harm is  
10 likely in the absence of relief; (C) the balance of equities; and (D) whether an injunction  
11 is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.  
12 Ct. 365 (2008). In the Ninth Circuit, assuming that the other two elements are met, a  
13 plaintiff may meet its burden by raising serious questions going to the merits and  
14 demonstrating that the balance of hardships tips sharply in its favor. *Alliance for the*  
15 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (concluding that  
16 *Winter* had not “eliminated the longstanding discretion of a district judge to preserve the  
17 status quo with provisional relief until the merits could be sorted out in cases where  
18 clear irreparable injury would otherwise result and at least “serious questions” going to  
19 the merits are raised”) (quoting *Save Strawberry Canyon v. Dep’t of Energy*, 2009 WL  
20 1098888, at \*1–3 (N. D. Cal. Apr. 22, 2009)).



1           77. Here, based on obviously inaccurate and/or inadequate information, the  
2 DOL is turning Washington blueberry farms from profitable to unprofitable. Millions  
3 and millions of dollars of additional labor costs will be imposed nearly overnight,  
4 without any commensurate increases in crop prices or, in most cases, any ability to pass  
5 on these massive cost increases to customers whatsoever. Further, the likely result of  
6 the unilaterally imposed wage increase will be a temporary surge in employee wages  
7 (from \$15.03 per hour to \$17.13 per hour), followed by a likely reduction of blueberry  
8 farming activities by Zirkle and others and a reduction in the number of farmworkers  
9 earning a living wage.

10           78. If injunctive relief is not granted and employers are forced to pay these  
11 suddenly increased wage rates beginning this week, a future ruling against the DOL's  
12 actions will be cold comfort to Zirkle, even if it is somehow able to remain in operation.  
13 Once wages are paid to a transient and foreign workforce, they will never be returned.

14           79. On the other hand, Zirkle proposes to set aside the amount that it would be  
15 required to pay under the Notice. That way, if the Court were to grant temporary or  
16 preliminary injunctive relief but ultimately side with the DOL's position, any wages  
17 owed under the Notice could be paid without delay.

18           80. Thus, the balance of equities weighs strongly in the favor of preserving the  
19 status quo and affording these agricultural employers at least temporary or preliminary  
20 injunctive relief while this issue can be litigated fully.

81. Further, permanently enjoining implementation and enforcement of an inaccurate Prevailing Wage Rate serves the public interest.

## **VII. RELIEF REQUESTED**

1. Enter a temporary restraining order and preliminary injunction pending a decision on the merits enjoining the Defendants from implementing or in any way enforcing the 2019 Washington State Prevailing Wage Rate for blueberry harvesting as indicated in the July 24, 2019 Notice of Wage Adjustment issued by the Department of Labor;
2. Enter a declaratory judgment invalidating and setting aside the 2019 Washington State Prevailing Wage Rate for blueberry harvesting as it is indicated in the July 24, 2019 Notice of Wage Adjustment issued by the Department of Labor;
3. After an expedited evidentiary hearing, permanently enjoin Defendants from implementing or in any way enforcing the 2019 Washington State Prevailing Wage Rate for blueberry harvesting as it is indicated in the July 24, 2019 Notice of Wage Adjustment issued by the Department of Labor;
4. Award Plaintiff its costs and expenses, including reasonable attorney fees; and
5. Award such further and additional relief as is just and proper.

1 DATED this 7th day of August, 2019.

2 STOKES LAWRENCE  
3 VELIKANJE MOORE & SHORE

4 By: /s/ Brendan V. Monahan

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